IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1590

GROVER JONES, JR., *Appellant*,

v.

THE COMMITTEE OF LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Appeals of the State of West Virginia, entered on January 18, 1979, disbarring appellant from the practice of law in the State of West Virginia, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Appeals of the State of West Virginia was originally to be reported at 239 S.E.2d 133 (W.Va. 1977). However, that opinion was withdrawn from publication pending a rehearing of the cause. By Final Order dated January 18, 1979, the Supreme Court of Appeals rendered its decision on

rehearing. A copy of the unpublished opinion is attached hereto as Appendix A; a copy of the Final Order is attached hereto as Appendix B.

JURISDICTION

This proceeding was instituted pursuant to Article VI of the By-Laws of the West Virginia State Bar. The judgment of the Supreme Court of Appeals of West Virginia was originally entered on November 22, 1977. On December 20, 1977, appellant petitioned for a rehearing. On February 5, 1978, the Supreme Court of Appeals granted the rehearing, but limited the scope of the rehearing to reconsideration of the penalty imposed and the amount of costs awarded against appellant. On January 18, 1979, the Supreme Court of Appeals by order *per curiam* reaffirmed in all respects its prior decision.

Notice of Appeal was filed in the Supreme Court of Appeals and served on appellee on April 9, 1979. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The decision in *Withrow* v. *Larkin*, 421 U.S. 35 (1975), sustains the jurisdiction of the Supreme Court to review the judgment on direct appeal.

QUESTION PRESENTED

Is a defendant in a disciplinary proceeding denied due process under the Fifth and Fourteenth Amendments to the Constitution of the United States where a single, judicially created committee is empowered to (1) initiate complaints against members of the bar; (2) investigate and prosecute such complaints; (3) conduct

hearings at which evidence relating to defendant's activities will be introduced by the committee's own prosecutor; (4) make recommendations to the state's highest court regarding the defendant's fitness to practice law; and (5) institute proceedings before said court to discipline the defendant?

STATUTES INVOLVED

West Virginia Code 51-1-4a and the By-Laws of the West Virginia State Bar, Article VI, Sections 1-22, as amended, are set forth in Appendix C hereto.

STATEMENT

Pursuant to the terms of the Will of William B. Hamby and by court order, appellant, a practicing attorney since 1966, was appointed executor of the estate. Appellant, who drafted the Will, was also designated as one of the two co-trustees of a trust fund established by the Will for the benefit of Mr. Hamby's wife, Nellie Lucille Hamby (Comm.-Hamby Exh. 1, Comm. Fdgs. para. 2).[1]

In 1975, a civil action was filed in the United States District Court for the Southern District of West Virginia alleging misuse by appellant of certain funds belonging to Mrs. Hamby and demanding an accounting. Ostensibly, based upon this civil action, the appellee filed and served upon appellant a Notice of Hearing together with a two-count Statement of Charges against appellant. (Comm. Exh. 1)[2] The charges were on the basis of alleged deceit, fraud, misappropriation, conversion, misrepresentation and dishonesty in the handling

[1] References to the Findings made by the Committee in its Findings and Recommendations are referred to herein as "(Comm. Fdgs. para._____)."

[2] Committee Exhibit 1 contained two separate complaints, one of which was dismissed by the Committee.

of this estate by appellant, his first fiduciary experience as a trustee under a Will (Tr. 897-898).[3]

The Ethics Committee of the West Virginia State Bar or its subcommittee is authorized and directed to conduct investigations, either on its own initiative or upon request or information, respecting legal ethics, unprofessional conduct, malpractice and the professional standards of bench and bar of West Virginia.[4] It is given broad powers to issue summons and subpoenas, to conduct informal and formal proceedings and is empowered to prosecute any charges which are heard by it.[5]

A hearing on the charges was held in Charleston, West Virginia, from February 1 through February 5, 1977, and the only dispositive facts disclosed were that appellant withdrew from the trust account, by withdrawal slips duly signed by him in his own proper name, certain sums of money, (Comm. Ex. 4N, 4P, 4Q, 4S, 4T, 4U and 4V; Tr. 964), which he personally used (Tr. 1042, 1052, 1068), making an accounting thereof only after suit had been instituted for an accounting, (Ex. 12; Comm. Ex. 29), but without any prior demand for an accounting ever having been made, (Tr. 356), and without loss or principal or interest to the beneficiary. (Tr. 329, 330).

At the outset of the hearing, counsel for appellant began to make a record of bias and prejudice[6] by protesting: that the chairman of the committee either investigated or guided the investigation; that he had

[3]A hearing on the charges was held in February, 1977, and the reference is to the transcript thereof.

[4]Article VI, Part A, §4, of the By-laws, Appendix C, page C-4.

[5]Article VI, Part A, §§8, 9, 12 and Part C, §§13 and 15, of the By-laws, Appendix C, pages C-6-10.

[6]Tr. pp. 11-14.

obtained prior knowledge of various phases of the investigation and presumably obtained prior knowledge of unfavorable information that was being uncovered; that the Sub-Committee, which included the Chairman who was tainted with prior knowledge, would be the body and the only body that would hear and initially weigh the evidence; and that it would be this Sub-Committee which, having heard the evidence, would make recommendations to the full committee which at most could only read a transcript without the benefit of actually hearing and seeing the witnesses and then would, in turn, make representations to the West Virginia Supreme Court. It was argued that such prior knowledge would make it unlikely that the Chairman and other members of the Sub-Committee could maintain open minds in listening to and evaluating the evidence and that its objectivity, when much hearsay might have been revealed to it, would be highly questionable.

The Chairman of the Sub-Committee contented himself with a mere assertion that he had no prejudgment against appellant and that the matter of his having conducted the investigation of the Committee was overstated. Nonetheless, he admitted that "these matters" did come to him, although he immediately asserted that they came to him no more than they would come to any other member of "this Committee" in the course of ordinary Committee matters.[7]

At the end of the hearing before the Sub-Committee, counsel for appellant again asserted the inadequacy of the proceeding and its potential for bias and prejudice and moved to dismiss and terminate the proceedings.[8]

[7]Tr. p. 14

[8]Tr. pp. 1198-1201

On June 2, 1977, the appellee filed its Findings and Recommendations together with a verified complaint against the appellant in the Supreme Court of Appeals of West Virginia seeking the annulment of appellant's license to practice law. On June 6, 1977, a show cause Order was entered and the matter was presented to that Court on September 7, 1977; on November 22, 1977, appellant's license to practice law was annulled.[9] On December 20, 1977, the appellant filed a timely petition for rehearing asserting numerous errors in the opinion and by Order entered January 18, 1977, the Court affirmed the revocation and awarded costs and expenses to appellee.[10]

THE QUESTIONS ARE SUBSTANTIAL

A disbarment, although designed to protect the public, is a punishment or penalty to be imposed upon the lawyer and, ". . . is of a criminal or quasi-criminal nature". *In re Ruffalo*, 390 U. S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968); *In re Ming*, 469 F. 2d 1352 (7th Cir. 1972); *Erdman* v. *Stevens*, 458 F. 2d 1205 (2d Cir. 1972).

In re Ruffalo involved various procedural due process violations during a state disbarment proceeding. The Supreme Court of the United States applied basic due process requirements to disbarments. Ruffalo had been charged with misconduct in his handling of Federal Employee's Liability Act cases. During the state disbarment hearing a new charge of misconduct was levied against Ruffalo, a charge based upon the testimony of a State Board's witness. The issue finally narrowed

[9]A copy of the *per curiam* opinion is attached hereto as Appendix A, pages A-1-7.

[10]A copy of this Order is attached hereto as Appendix B, pages B-1-2.

down to one concerning the defendant's constitutional right to notice of the charge and a hearing. The United States Supreme Court, in reversing defendant's disbarment, strongly stated that the defendant not only had a right to due process but also was to be afforded the constitutional rights as was any other defendant. Note the following language in *Ruffalo*:

> ". . . *Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process . . . These are adversary proceedings of a quasi-criminal nature . . .*" (Emphasis supplied).

Cf. *In re Donegan*, 282 N. Y. 285, 26 N. E. 2d 260 (1940); *Furman* v. *State Bar of California*, 12 Cal. 2d 212, 82 P.2d (1938).

By no means is *Ruffalo* a restricted opinion confined to its own circumstances. The *Ruffalo* case has been cited numerous times in both federal and state court cases dealing with the nature of disciplinary proceedings and the constitutional guarantees afforded a defendant in such hearings. See, e.g., *In re Ming*, 469 F. 2d 1352 (7th Cir. 1972); *In re Fleck*, 419 F 2d 1040 (6th Cir. 1969); *Taylor* v. *Kentucky State Bar Association*, 424 F. 2d 478, 481 (6th Cir. 1970); *In re Stivers*, 292 N. E. 2d 804, 808 (Ind. 1973); *Committee on Professional Ethics and Grievances* v. *Johnson*, 447 F. 2d 169 (3rd Cir. 1971).

The underlying reasons for this Court's decision that disbarment proceedings are criminal or quasi-criminal in nature are clearly explained in *Erdmann* v. *Stevens*, 458 F. 2d 1205 wherein the Court noted:

> " . . . *in our view a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than a civil proceeding.* A

lawyer is not usually motivated solely by the prospect of monetary gain in seeking admission to the bar or in practicing his chosen profession. *However, it cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine* . . . Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment—loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and his client relations as well as adversely affect his ability to carry out his professional functions . . . *Undoubtedly these factors played a part in leading the Supreme Court (of the United States) to characterize disbarment proceedings as being 'of a quasi-criminal nature'* (citing *In re Ruffalo, supra*). (Emphasis supplied).

". . . the power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights . . . a court may neither act arbitrarily with respect to those licensed by it nor otherwise violate their constitutional rights . . ." (Emphasis supplied).

The language in *Erdmann, supra,* is neither novel nor is it confined to modern application. The West Virginia Supreme Court of Appeals, in 1947, twenty-five years prior to the *Ruffalo* and *Erdmann* decisions, set clear precedent and applied the common sense approach to the nature of disbarment proceedings. Accordingly, in *In re Damron,* 131 W. Va. 66, 45 S. E. 2d 741 (1947), that Court, per Justice Haymond, held that:

"The disbarment of an attorney from practicing in the court which orders it and the manifestly more severe action of annulling his license to practice his profession in all courts are fraught with grave disaster for him who experiences either misfortune. *Each takes from him his customary means of earning a living for himself and his dependents. Each deprives him of a valuable professional right or privilege and destroys his professional standing. Each removes him from the sphere of conduct for which by training and experience he is best fitted and forces him to seek a different kind of activity in which he is inexperienced and for which ordinarily he is not properly qualified. Even in other types of work the stigma of his past unfitness remains and operates as a handicap in his efforts to succeed . . .*" (Emphasis supplied).

Notwithstanding, the West Virginia Court answered the due process contention which was originally advanced by the appellant by saying that it found no merit in it. The Court justified its finding of "no merit" by asserting first of all, that the "defendant" did not allege that the designated Sub-Committee of the State Bar Ethics Committee prejudiced him by a display of actual bias or hostility, and further, that the record did not evidence any bias or hostility."[11]

This conclusion of the Court is demonstrably inaccurate and ignores the following specific illustrations of an attitude of hostility, prejudgment, bias and prejudice exhibited by the Sub-Committee:

(a) At page 272 of the transcript, the Chairman revealed that he had already concluded that, regardless of good-faith reliance on established practice, there was no way in which appellant could have been qualified as Trustee. When counsel endeavored to disclose the prac-

[11]Appendix A, page A-5.

tice that was followed in Monroe County, the County in which appellant was to be qualified and administer the estate, the Chairman said, "Don't tell me. I've probated many of them." (Tr. pp. 272-273).

(b) When counsel for appellant alluded to the fact that the settlement of the estate was headed "Settlement, Executor and Trustee", the Chairman of the Sub-Committee said, "I can't help that. He didn't qualify for anything but Executor by the Will, which is attached to Committee-Hamby Exhibit 1." (Tr. p. 273).

(c) When counsel for appellant urged that appellant had no obligation to look for the co-trustee or have him come and qualify, the Chairman of the Sub-Committee said, "Well, you're going to have to cite something to me for that." And, "You'll have to give us a brief at the end on that because *I can't agree with that conclusion.*" (Tr. pp. 273-274). (Emphasis supplied.)

(d) Having concluded (erroneously) that appellant had some unilateral duty to locate the co-trustee and get him qualified, the Chairman, even though it appeared that the co-trustee had been out of the State of West Virginia, refused to permit counsel for appellant to vouch the record regarding the whereabouts of the co-trustee. (Tr. pp. 281-283). Thus, the Chairman cut off the right of counsel for appellant, in cross-examining the co-trustee, either to test the witness' credibility or to show the unlikelihood of the co-trustee being located, and refused to permit counsel to preserve the issue in a proper manner on the record.

Counsel for appellant said, "I take it I'm being denied the opportunity to vouch the record?" The Chairman replied, "Absolutely. We will proceed." In this, he

was supported by the other two (2) members of the Sub-Committee, one of whom said, "I can't see the materiality of it" and the other of whom said, "I'm not interested in it." (Tr. p. 283).

(e) In a discussion in which counsel for appellant was endeavoring to demonstrate the financial responsibility of appellant and the importance thereof with reference to mere paper evidence of security, the Chairman stated, "I don't see what relevance that has," (Tr. p. 328) and announced the conclusion, "If he's holding it in trust, that's a different thing". (Tr. p. 328).

(f) When counsel for appellant urged that appellant had accounted for every dollar that came in, plus interest, with no allowance for the Trustee's commission, the Chairman stated, "That's *your* assertion." (Tr. p. 377). (Emphasis supplied).

(g) When counsel for appellant urged that it was the position of appellant that he had an absolute right to do what he did, the Chairman stated, "That's a new principle of trustee trust as far as I'm concerned." (Tr. p. 381).

(h) At page 543 of the transcript, the Chairman disclosed that he had already concluded that appellant was guilty. The Chairman stated, "This man was a Trustee. He's admitted in at least some of the documentary evidence here that he misused trust funds which in and of itself is sufficient to sustain Charge 2." The Chairman then continued announcing his conclusion by saying, "Well, borrowing is misuse, too, of trust funds at least to this point unless you change it." (Tr. pp. 543-544).

(i) On the matter of the propriety of collecting fees, as reported on the return, the Chairman first refused to

let the witness Sarver, who was a former county clerk and frequently assisted the commissioner of accounts, testify with reference to the propriety of an executor's charging a fee for collecting items of personal property and stated, "I don't care how he reported it." (Tr. pp. 748-749).

(j) On the question of whether appellant ever received or acted pursuant to any competent advice regarding his entitlement to a Trustee's fee, the Chairman said at page 905, "I don't want any answer."

(k) The Chairman also gratuitously found and declared that testimony offered by appellant regarding instructions given to him by Mr. Hamby was "objectionable". (Tr. p. 917).

(l) When counsel for appellant endeavored to emphasize the importance of certain evidence and said with reference to appellant, "His life is at stake," one of the members of the Sub-Committee, in what can only be referred to as a manifestation of snideness, said, "What is at stake?" (Tr. p. 917). This was supplemented by the unsolicited comment by the Chairman, "That doesn't alter the rules though, Mr. Preiser." (Tr. p. 917).

(m) With reference to an exchange regarding a stipulation, the Chairman said, "It doesn't mean anything that Jones says is true." (Tr. p. 1058).

(n) When the question of the advisability of giving security for loans was being discussed and appellant asserted that one could need money and yet have lots of property and lots of equity, the Chairman proclaimed as a foregone conclusion, "That's exactly the reason why there should be security for the Trust." (Tr. p. 1066). Still, when counsel moved to strike the statement of

the Chairman, the Chairman stated, "That statement will remain." (Tr. p. 1066). This was a clear indication that the Chairman had made up his mind that any conduct which deviated from his preconception of what was proper was automatically without merit and not capable of justification.

(o) On the issue of whether a trustee commission could be taken as of July 27, 1972, the Chairman exposed the fact that he had already resolved the issue against appellant and said, "He wouldn't be entitled to any Trustee's Commission as of that date." (Tr. p. 1086).

(p) One of the critical questions was whether appellant borrowed the money with the consent of the trust beneficiary. When counsel for appellant contended that he had such consent, the Chairman again demonstrated that he had arrived at a conclusion by saying, "Now we disagree with that." (Tr. p. 1122).

(q) What subsequently turned out to be a most important issue was whether appellant had represented that certain sums were bank balances. When appellant contended that he had not represented such sums to be bank balances but had merely reported the amounts in the trust account, the Chairman again indicated that his mind was closed and that he had reached a conclusion by saying, "What was he doing? Pulling this figure out of the air? What does it do if it doesn't represent the bank balance?" (Tr. pp. 1133-1134). It never occurred to the Chairman even to consider that "bank balance" and "trust balance" are indeed not necessarily the same.

(r) Manifesting that his mind was made up and that nothing less than perfection would be condoned by the Ethics Committee, the Chairman said, "The best you

can do isn't enough when you're dealing with somebody else's funds." (Tr. p. 1135). What lawyer can possibly meet such an impossible standard? If guilt is established by imperfection alone, defense is rendered futile.

(s) Typifying the contemptuous attitude generally displayed toward applicant is the remark made when counsel for appellant objected that appellant had not been permitted to complete an answer and stated that appellant had his lips moving, to which Mr. Wilson, a member of the Committee, responded, "Please continue to move your lips then." (Tr. p. 1175).

(t) When being questioned by Mr. Wilson, a member of the Sub-Committee, about the attorneys' fees, Mr. Wilson asked whether appellant expected the widow to bear this "$9,000—some expense " When appellant responded that he thought the attorneys' fees were unreasonable and that he didn't think that Mrs. Hamby should have to pay the attorneys' fees, Mr. Wilson concluded, "Well, I can't get a straight answer." (Tr. p. 1186).

All the above tend to show that the Sub-Committee had prejudged the cause; had determined that appellant was guilty before the hearing was closed; were contemptuous in their references to positions taken by both appellant and his attorneys; and were merely going through the formality of holding a hearing without being prepared to base a fair and reasoned decision upon the evidence adduced at the hearing. Minds that are closed are fortresses which doom to destruction all who have the temerity to attempt to breach their walls.

The illustrations set forth above are some of the instances in which bias, hostility and prejudice are revealed

by the record. It was not, therefore, accurate for the West Virginia Court merely to say that the record did not evidence any display of hostility, bias and prejudice.

The West Virginia Court, having failed to give credence to demonstrations of hostility, bias and prejudice, concluded that *Withrow* v. *Larkin*, 421 U.S. 35, (1975) was dispositive of the due process issue, presumably under the fourteenth Amendment to the Constitution of the United States, as well as under Article 3, §10 of the Constitution of West Virginia.

The Court arrived at *Withrow* v. *Larkin* by first concluding that the only case which is at all similar to the instant case, namely, *In Re Schlesinger*, 404 Pa. 584, 172 A.2d 835 (1961), was unpersuasive, presumably on the theory that the fundamental concept of due process was perverted during a period of hysteria, political paranoia and repression.[12] This was a unique way to distinguish a case which was identical to the instant case in that (a) the Committee acted on its own initiative in lodging the Complaint; (b) the Committee appointed counsel to prosecute the charges on its own behalf before its own Sub-Committee; (c) the Committee called and examined its witnesses against the attorney and conducted the adverse proceeding before its own Sub-Committee; and (d) the Committee not only presided over its own hearings and passed upon the credibility of witnesses, but determined inferences to be drawn from the testimony and deduced the facts therefrom. All this led the Supreme Court of Pennsylvania to conclude that the Committee acting as prosecutor, judge and jury did not and could not provide due process. It also commented unfavorably on

[12]Appendix A, page A-5.

the procedure whereby the Court of Common Pleas disbarred the attorney "without any hearing of witnesses."[13] The Supreme Court of Pennsylvania was motivated by a concern for due process as a principle for all seasons and it was not becoming to the West Virginia Court to suggest that political hysteria dictated that distinguished Court's concern.

The West Virginia Court's reliance on *Withrow* v. *Larkin* resulted from an over-reading of that case and from a complete disregard of factual differences and judicial cautionary language.

First, the investigation procedure which was involved in that case was such as to require an investigative hearing at which the appellee and his attorney were permitted to attend. They were able to learn what the testimony of all witnesses was going to be. Further, prior to any contested hearing, the doctor who was involved was allowed, if he desired, to appear and explain any of the evidence which had been presented. Finally, the actual circumstances which were involved in the case were such that the ultimate action taken by the board which was involved in that case was that there was *probable cause* for an action to revoke the license of the licensee in a proceeding which was to be initiated by the district attorney of Milwaukee County.

The Supreme Court of the United States did not say that all combinations of investigatory and adjudicatory functions were free from a proper due process charge. Indeed, this Court sounded a cautionary note in precise language at 421 U.S. 51, as follows:

> "That is not to say that there is nothing to the

[13]The situation there is strikingly similar to the one in which the West Virginia Court now finds itself herein.

> argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and other concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely."

At 421 U.S. 54, the Court cautioned:

> "Of course, we should be alert to the possibility of bias that may lurk in the way bad procedures actually work in practice."

Again, at 421 U.S. 58, the Court cautioned:

> "Clearly, if the initial view of the facts based on the evidence derived from non-adversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised."

And finally, at 421 U.S. 58:

> "That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high."

The Supreme Court, in *Withrow* v. *Larkin*, invited the West Virginia Court and other Courts to determine whether the risk of unfairness was intolerably high. The West Virginia Court has declined to accept that invitation and has apparently assumed that the Supreme Court of the United States, in *Withrow* v. *Larkin*, gave an

answer to a problem when, in fact, it only posed the problem.

It is submitted that the decision of the West Virginia Supreme Court of Appeals ignores the evidence herein and authorizes the appellee to conduct its disbarment proceedings in utter disregard of the Constitution of the United States. It is further submitted that the questions presented by this appeal are substantial and that it is of public importance.

Respectfully submitted,

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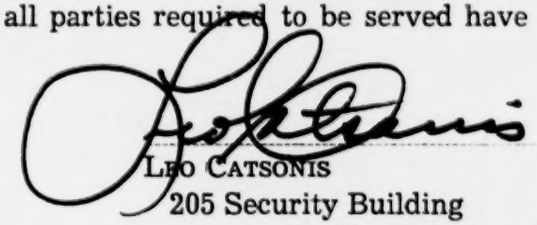
CERTIFICATE OF SERVICE

I, Leo Catsonis, one of the attorneys for the appellant, and a member of the the Bar of the Supreme Court of the United States, hereby certify, that on the 17th day of April, 1979, I served three copies of the foregoing Appeal on the appellee by depositing same in a United States mail box, with postage prepaid, addressed to counsel of record for the appellee, Robert B. King, Esquire, Federal Building, 500 Quarrier Street, Charleston, West Virginia 25301 and John O. Kizer, Esquire, 1200 Charleston National Plaza, Charleston, West Virginia 25301. I further certify that all parties required to be served have been served.



LEO CATSONIS
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APPENDIX

APPENDIX A

No. 13936

The Committee on Legal Ethics
of the West Virginia State Bar

v.

Grover Jones, Jr., Member of the
West Virginia State Bar

Attorney Disciplinary Proceeding — License to Practice Law Annulled.

PER CURIAM

1. Detaining money collected in a professional and fiduciary capacity without bona fide claim coupled with acts of fraud and deceit justify annulment of an attorney's license to practice law.

2. The disciplinary procedure of the West Virginia State Bar, wherein investigative, prosecutorial and fact finding functions are performed by the Bar Ethics Committee and this Court finally adjudicates each case, does not *per se* deny due process.

Per Curiam:

The complaint in this attorney disciplinary action, filed by The Committee on Legal Ethics of The West Virginia State Bar against Grover Jones, Jr., a member of The West Virginia State Bar, pursuant to provisions of Part D of Article VI of the State Bar's By-Laws, charges the attorney with the unauthorized misappropriation and conversion of $22,700 entrusted to him in his fiduciary capacity as executor and trustee under the Will of W. B. Hamby. The committee's report was filed with the complaint in compliance with Section 17 of Article

VI of the By-Laws. The Court's rule to show cause why the prayer of the complaint should not be granted and a disciplinary order entered was issued and served on the accused attorney. The action has been briefed by counsel for the parties and submitted for decision.

The complaint charges that Jones is guilty of six violations of the Code of Professional Responsibility: (1) That he engaged in deceptive, fraudulent and illegal conduct involving moral turpitude, violating Disciplinary Rule 1-102(A) (3); (2) that he has engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation, violating Disciplinary Rule 1-102(A) (4); (3) that he has engaged in conduct prejudicial to the administration of justice, violating DR 1-102(A) (5); (4) that he has engaged in conduct which adversely reflects on his fitness to practice law, contrary to Disciplinary Rule 1-102(A) (6); (5) that he has commingled funds held in a fiduciary capacity on behalf of a client with his own, in violation of Disciplinary Rule 9-102(A); and (6) that he failed to render appropriate accounts with respect thereto, violating Disciplinary Rule 9-102 (B) (3).

The prayer in the complaint asks annulment of the attorney's license to practice law, and reimbursement to the State Bar for its actual and necessary expenses incurred incident to these proceedings. Article VI, § 20, By-Laws of the State Bar.

The record reveals that by the terms of the Will of William B. Hamby and by Order of Probate dated December 11, 1970, Jones was appointed executor of the estate of William B. Hamby. He was also by the Will designated as one of two co-trustees of a trust fund established for Nellie Lucille Hamby, wife of William B.

Hamby. Jones, however, assumed the role of sole trustee and thereby assumed all the fiduciary duties of the trustee.

On or about May 4, 1971, Jones, in his fiduciary capacity, withdrew funds from the estate of W. B. Hamby in the amount of $29,582.13 by cashier's check from a bank in Virginia, and shortly thereafter deposited $28,-082.13 in a savings account entitled "Estate of W. B. Hamby, Grover Jones, Jr., Executor" in the Mercer County Bank, Princeton, West Virginia. Jones wrongfully withheld from the $29,582.13 cashier's check, $1,500.00 and wrongfully and improperly used this money for his own personal use.

Pursuant to Mrs. Hamby's directions as beneficiary of this trust, defendant did not pay her any interest as provided in the terms of the Will of W. B. Hamby, until November, 1973, when Mrs. Hamby requested that distribution of interest be made. For seventeen months thereafter, Jones paid Mrs. Hamby $100.00 per month; but the money came from his personal account.

While Jones managed the trust, he wrongfully withdrew from the funds thereof, and transferred to his own personal accounts, without any express or implied authorization from the trust beneficiary and in violation of his fiduciary duty, a total of $21,200.00. This sum, when added to the $1,500.00 improperly withheld by Jones when he opened the Mercer County Bank savings account, made a total of $22,700.00 held by Jones in a fiduciary capacity which he misappropriated for his own personal use.

In February, 1975, Mrs. Hamby and her accountant repeatedly attempted to obtain an accounting of the

trust funds from Jones. When he gave an accounting through his secretary on March 28, 1975, he falsely represented that the fund on deposit as of December 31, 1973, was $22,092.40 and as of December 31, 1974, $18,-517.12. In fact, the balances were $18,531.12 on December 31, 1973, and $356.66 on December 31, 1974.

Mrs. Hamby sought recovery of the misappropriated funds by civil suit filed April 17, 1975 in the United States District Court for the Southern District of West Virginia. The case was settled November 10, 1974, when Jones paid her the misappropriated money, with interest. Mrs. Hamby has, however, incurred substantial accountant and attorney fees in her efforts to recoup the trust corpus.

The record warrants the conclusion that the charges presented in the complaint have been proved by full, clear and preponderating evidence. *Committee on Legal Ethics* v. *Mullins*, ___ W. Va. ___, 226 S.E.2d 427 (1976); *Committee on Legal Ethics* v. *Pietranton*, 143 W. Va. 11, 99 S.E.2d 15 (1957). While each allegation has been separately and individually considered, the nature of the charges warrants consolidation for adjudicatory action.

This Court has held that detaining money collected in a professional and fiduciary capacity without bona fide claim coupled with acts of fraud and deceit, justify annulment of an attorney's license to practice. *In Re Hendricks*, 155 W. Va. 516, 185 S.E.2d 336 (1971).

In this case, there are no mitigating factors to temper our conclusion that the defendant has misconducted himself in such a way as to prove his unworthiness to practice law in this State. One of the basic elements of

fitness to practice law in any jurisdiction is that the attorney understand and honor the fiduciary duty of a trustee to maintain the integrity of the trust corpus.

Likewise, we find no merit in defendant's contention that the disciplinary procedure of the West Virginia State Bar denies due process by violating respondent's right to appear before an impartial, unbiased hearing tribunal. U.S. Const. amend. XIV, § 1; W. Va. Const., art 3, § 10; *North* v. *West Virginia Board of Regents*, ___ W. Va. ___, 233 S.E.2d 411 (1977).

Defendant does not allege that the designated Subcommittee of the State Bar Ethics Committee prejudiced him by a display of actual bias or hostility. Nor does the record evidence any. Rather, he theorizes that the investigative, prosecutorial and fact-finding functions of the Subcommittee overlap so as to inherently prejudice the Subcommittee against an attorney brought before it.

Defendant cites *In Re Schlesinger*, 404 Pa. 584, 172 A.2d 835 (1961) in support of his contention. The case is unpersuasive. It is a unique action reinstating an attorney who was disbarred for "professional misconduct" on the ground that he had been a communist party functionary twenty years prior to his disbarment. The Pennsylvania court found the proceedings against Schlesinger substantively and procedurally irregular in a multitude of ways, and it addressed itself to reaffirming the fundamental concept of due process which was perverted during a period of hysterical political paranoia and repression.

We believe *Withrow* v. *Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L.Ed.2d 712 (1975) is dispositive of the issue here. The U.S. Supreme Court held that a Wisconsin

statute which empowered a medical examining board to warn and reprimand a physician, to temporarily suspend his license, to institute criminal or license revocation proceedings, and both to investigate and adjudicate the physician's case, did not violate due process of law. The Court observed:

> The mere exposure to evidence presented in nonadversary investigative procedure is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing. Without a showing to the contrary, state administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." [citation omitted.] 421 U.S. at 55.

We find that the internal organization of the Ethics Committee of the State Bar minimizes any exposure that the fact-finders may have to the results of preliminary investigation. Counsel for the Subcommittee is in charge of investigation and preparing the case against the respondent; the Subcommittee acts as fact-finder; and the role of the adjudicator reposes with this Court. Thus, the Committee's organization alone creates no inherent prejudice, and the fact that a member of the Subcommittee may be exposed to matters adduced by the preliminary investigation is insufficient to overcome the presumption of administrative integrity. Further, it has been soundly reasoned that "the bias and familiarity with a case, which will disqualify, must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Duffield* v. *Charleston Area Medical Center*, 503 F.2d 512, 517 (4th Cir. 1974). The argument for finding inherent prejudice

must fail. *See also, Hortonville Joint School District* v. *Hortonville Education Association*, 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976); *O'Brien* v. *DiGrazia*, 544 F.2d 543 (1st Cir. 1976); *Powell* v. *Ward*, 542 F.2d 101 (2d Cir. 1976); *Jonal Corporation* v. *District of Columbia*, 533 F.2d 1192 (D.C. Cir. 1976); *Satterfield* v. *Edenton-Chowan Board of Education*, 530 F.2d 567 (4th Cir. 1975); *Martin-Trigona* v. *Underwood*, 529 F.2. 33 (7th Cir. 1975).

Therefore the prayer of the complaint is granted and the license of the defendant, Grover Jones, Jr., to practice law in this State is annulled.

Further, complainant is directed to submit a statement to the defendant itemizing the actual and necessary expenses reasonably incurred by complainant in connection with these proceedings and Jones is ordered to pay them.

License to practice law annulled.

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 18th day of January, 1979, the following order was made and entered, to-wit:

Per Curiam

The Committee on Legal Ethics
of The West Virginia State Bar

13936 vs.

Grover Jones, Jr., a member
of The West Virginia State Bar

This Proceeding came on this day for decision upon the complaint of the Committee on Legal Ethics of The West Virginia State Bar with accompanying Certification of Committee Report, and exhibits, and the Findings and Recommendations of said Committee recommending that the respondent's Grover Jones, Jr., license to practice law in the State of West Virginia be annulled for professional misconduct; upon the rule issued thereon; upon the argument and briefs of counsel; upon the order *per curiam* filed herein on November 22, 1977, revoking and annulling the license and authority of the respondent to practice law in the State of West Virginia and requiring the respondent to reimburse the Committee for its actual and necessary expenses; upon the petition for rehearing filed December 20, 1977; upon the order of this Court entered February 5, 1978, granting the petition for rehearing but limiting said rehearing to reconsideration of the penalty imposed and the amount of costs awarded against the respondent; upon the rehearing of the case as so limited on June 6, 1978; and, upon

the argument and briefs of counsel thereon. Upon consideration of all of which, the Court is of opinion and doth find that the respondent's misconduct was such as to warrant the annulment of his license to practice law in the State of West Virginia and, that the opinion *per curiam* announced herein on November 22, 1977, is in all respects justified and correct except as hereinafter modified.

It is therefore considered and ordered that the license of the respondent, Grover Jones, Jr., be, and the same is hereby, revoked and annulled effective as of November 22, 1977, the date of the original order herein, for purposes of Article VI, Part H, §31 of the By-Laws of The West Virginia State Bar.

It is further ordered that the respondent, Grover Jones, Jr., reimburse the Committee in the amount of $2,332.78, the amount of expenses certified to this Court December 20, 1977, as actual, reasonable and necessary, less legal fees, plus any such additional expenses incurred on rehearing, less legal fees.

The Clerk of this Court is hereby directed promptly to certify a copy of this order to the Secretary of The West Virginia State Bar, pursuant to Section 32 of Article VI of the By-Laws of The West Virginia State Bar, and a duly attested copy of this order shall be mailed to the respondent, with return receipt requested, and to counsel of record in this proceeding.

A True Copy

Attest: George W. Singleton
Clerk Supreme Court of Appeals

APPENDIX C

§ 51-1-4a. Rules governing practice of law; creation of West Virginia State bar; providing its powers, and fees for administration.

The supreme court of appeals of West Virginia shall, from time to time, prescribe, adopt, promulgate, and amend rules:

(a) Defining the practice of law.

(b) Prescribing a code of ethics governing the professional conduct of attorneys at law and the practice of law, and prescribing a code of judicial ethics.

(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law.

(d) Organizing and governing by and through all of the attorneys at law practicing in this State, an administrative agency of the supreme court of appeals of West Virginia, which shall be known as "the West Virginia State bar." The West Virginia State bar shall be a part of the judicial department of the State government and is hereby created for the purpose of enforcing such rules as may be prescribed, adopted and promulgated by the court from time to time under this section. It is hereby authorized and empowered to perform the functions and purposes expressed in a constitution, by-laws and amendments thereto as shall be approved by the supreme court of appeals from time to time. All persons practicing law in this State shall be members of the West Virginia State bar in good standing: Provided, however, that the West Virginia State bar shall not become operative until its constitution and by-laws shall first have been submitted to all attorneys at law practicing in this State, including those presently serving in the armed forces

of the United States, for the purpose of securing the suggestions and recommendations of all such attorneys at law, for a period of at least sixty days prior to the entry of an order by such court approving said constitution and by-laws.

(e) Fixing a schedule of fees to be paid by attorneys at law practicing in the State of West Virginia for the purpose of administering this section, and providing for the collection and disbursement of such fees: Provided, however, that the annual fees to be paid by any attorney at law shall not exceed the sum of five dollars, unless a majority of the attorneys at law practicing in this State consent to the payment of a higher annual fee.

The inherent rule-making power of the supreme court of appeals is hereby declared.

When and as the rules of the court herein authorized shall be prescribed, adopted, and promulgated, all laws and parts of laws that conflict therewith shall be and become of no further force or effect to the extent of such conflict.

ARTICLE VI.

Procedure for Disciplining, Suspending and Disbarring Attorneys at Law.

Memo.: This article, prescribed, adopted and promulgated as a rule of the supreme court of appeals of West Virginia, supersedes the "Procedure for disciplining, suspending and disbarring attorneys at law," promulgated by an order of said court, entered on March 28, 1947 [set out in volume 128 of the West Virginia Reports, p. lii], and, to the extent of any conflict, renders of no further force or effect any laws and parts of law that conflict herewith.

§ 1. Duties.

The standard of professional ethics and conduct of the bench and bar of the State of West Virginia is of the highest importance to the people of the State, to the State itself, and to the members of the legal profession. It is incumbent upon every member of the profession, and particularly upon those who have undertaken the responsibilities and authorities of judicial preferment, to actively uphold those standards and to act diligently and vigilantly in the investigation and prosecution of violations of those standards.

It shall be the duty of every member of the state bar to make full report to the secretary concerning every breach of professional standards which shall come to his attention.

§ 2. Grounds for action.

Every member of the legal profession shall observe the highest standards of professional conduct. The canons of ethics promulgated by the supreme court of appeals of West Virginia now or hereafter in effect shall be carefully observed. Any allegation of: Violation of such canons; the commission of a criminal offense showing professional unfitness or moral turpitude; the detention of any property or money collected in any professional or fiduciary capacity without bona fide claim thereto; the solicitation of professional business; or any conduct involving fraud or deceit, shall, among other things, constitute good grounds for investigation as hereinafter provided and, if deemed warranted, for the institution of appropriate proceedings.

§ 3. Remedies cumulative.

Nothing in this article contained shall be deemed to interfere with the inherent powers of any court.

Part A. Committee on Legal Ethics

§ 4. Creation; jurisdiction.

There shall be a committee known as "the committee on legal ethics of The West Virginia State Bar," which shall have jurisdiction to make investigations or cause to be made investigations by its subcommittee or by the proper grievance committee, to the extent deemed necessary, of every complaint, request and information respecting legal ethics, unprofessional conduct, malpractice, and, in the most general sense, the professional standards of the bench and bar of West Virginia, including petitions for reinstatement of an attorney at law in this State, which may come before it, and to hold hearings thereon and make such findings and recommendations and take such other action as is authorized by this article.

The committee shall take any and all action as to matters within its jurisdiction upon its own motion or upon the request of the board or the president, or upon the request of any court of record or judge thereof, or upon the verified complaint of any person. As to any matter or action over which the committee has jurisdiction, it may proceed in the name of the West Virginia state bar or in the name of such committee, or in the name of any authorized subcommittee or member or members, as it may deem proper.

There shall be included within the jurisdiction of the committee on legal ethics of the West Virginia state bar all attorneys specially admitted to practice by a court of West Virginia or any individual admitted to practice as an attorney in any other jurisdiction who regularly engages in the practice of law in West Virginia.

The committee may render advisory opinions on any question of professional conduct. It may investigate and

approve or disapprove publications in the nature of legal lists or directories as a medium of professional listing of members of the state bar.

With the consent of the board, such committee may promulgate and amend and revoke rules and regulations for the transaction of its business.

The enumeration above and elsewhere in this article, of particular powers and duties of such committee, shall not be deemed to imply any denial of, or restriction or limitation upon, the responsibility of such committee, and its general and plenary power, to exercise all the powers of the state bar in regard to the professional standards of the bench and bar of West Virginia, and no action of the board shall be required to authorize the exercise of such powers.

(Amendments approved on September 24, 1962 and December 7, 1971.)

§ 5. Members; terms; vacancies; removals.

The committee on legal ethics shall consist of nine members, selected by the board from the active members of the state bar. In the year 1964 and each year thereafter, three members shall be selected for three-year terms. The members heretofore appointed shall be continued for the remainder of their terms, and the two additional members provided for by this amendment shall in the first instance be selected for terms expiring on such dates as will result in three members being selected annually thereafter. Vacancies occurring for any reason shall be filled by the board for the unexpired terms. If a member of such committee be determined by the board to have become incapacitated from performing his duties as such member, or be absent from

any two consecutive meetings of such committee, without cause deemed adequate by the board, he may be removed by the board. The term of office of each member shall commence at the conclusion of the annual meeting designated by the board in making his appointment.

(Amendment approved on October 22, 1963.)

§ 6. Officers; subcommittees.

For such committee a chairman and a vice chairman shall be designated annually by the board from the members of such committee. Such committee may designate other officers and subcommittees, from its own members, with such of its powers and responsibilities as it may deem proper.

§ 7. Meetings; quorum.

Such committee shall meet, at any place in the State of West Virginia, upon call of its chairman or vice chairman, or upon call of the president of the state bar. Upon written request of five governors the president or secretary shall call a meeting of such committee.

Three members of such committee shall constitute a quorum.

§ 8. Summons and subpoena powers.

In any investigation or hearing under this article, such committee, any grievance committee, any authorized member of either thereof, or any governor or officer of the state bar shall have the power, by summons or subpoena issued under the hand of any authorized member of either committee or of any governor or such officer, to summon and examine witnesses under oath administered by any member of said committees, any governor

or such officer, and to compel their attendance and the production of any and all books, papers, letters and other documents necessary or material to the inquiry.

§ 9. Effect of summons or subpoena.

Any such summons or subpoena issued as provided in the preceding section [§ 8] shall have the same force and effect as a summons or subpoena issued by a circuit court of the State of West Virginia. If any witness or other person shall fail or refuse to appear, or to be sworn, or to testify, or to produce books, papers, letters or other documents demanded, upon application to a circuit court or the judge thereof within the congressional district in which any investigation or hearing is being conducted, a rule or an attachment shall be issued against such witness or other person as in cases of contempt.

§ 10. Reports.

Such committee shall report to the secretary in writing immediately upon initiating any investigation or other action, and shall thereafter report to him from time to time the status thereof, and upon final disposition of any matter shall forward to him a report thereon with the complete file thereof.

PART B. COMPLAINTS AND INVESTIGATIONS

§ 11. Complaints.

Any complaint made or received by any member of the state bar shall be forwarded by him to the secretary. The secretary shall also receive complaints from any court or judge, and from the public. The secretary shall make a record of each such complaint and forthwith refer it to the committee on legal ethics.

§ 12. Investigations; informal hearing.

Without issuing any notice or charges, such committee shall investigate or cause to be investigated by its subcommittee or by the proper grievance committee, to the extent deemed necessary, every complaint, request and information coming before it, and if after investigation the legal ethics committee determines that the same does not merit disciplinary action, it shall dismiss the same. If after investigation the committee determines that the same may warrant disciplinary action, it shall give the accused attorney a written notice containing a plain statement of the charges against him and the fact that he is entitled to a formal hearing as provided in section thirteen of this article VI, which notice shall direct him to appear before the committee at a time and place to be designated therein and shall be served and executed on the accused attorney in accordance with the provisions of section thirty-five of this article.

Upon failure of the accused attorney to appear at the time and place set forth in the notice or after the accused attorney has appeared and been given full opportunity to present his defense to the charges contained in the notice, the committee shall consider the case, and after such consideration shall take such action in accordance with the provisions of section seventeen (a), (b) and (c) of this article as it deems warranted in the premises.

In the event a formal hearing is demanded by the accused attorney in accordance with this section and section thirteen, no other hearing shall be necessary

and the same shall be in lieu of any hearing for which notice may have been given at the time of such demand.

(*Amendment approved on September 24, 1962.*)

Part C. Formal Hearings

§ 13. Formal hearing.

The legal ethics committee may hold a formal hearing on any matter before it, but it shall not be required to, unless the accused attorney shall demand a formal hearing by a written request mailed by registered or certified mail to the chairman of the committee prior to the return date of the written notice provided for in section twelve of this article VI.

(*Amendment approved on September 24, 1962.*)

§ 14. Committee procedure.

Prior to any formal hearing a written notice of the time and place of the hearing, containing a plain statement of the charges against the accused attorney, shall be served and executed on the accused attorney in accordance with the provisions of section thirty-five of this article, and such notice shall direct the accused to file an answer to the charges with the committee on or before the return day thereof. Such hearing shall be held in the county in which the accused resides, or in which he has his principal office, or in which the alleged offense, or any part thereof, was committed, as the committee may determine. The rules of evidence applicable in cases in courts of record tried or heard by the court in lieu of a jury shall govern at such hearings, including evidence of deposition. An accurate record shall be

made of the proceedings at such formal hearing, unless waived in writing by the accused.

(*Amendment approved on September 24, 1962.*)

§ 15. Prosecution.

The charges at any such hearing may be prosecuted by any member or members of said committee or by counsel (not a member of said committee) appointed by the board or president on the request of said committee. It shall be the duty of each attorney at law so appointed to prosecute such charges diligently and to the best of his ability.

(*Amendment approved on September 24, 1962.*)

§ 16 Rights of accused person.

Any person so accused may be represented by counsel at such hearing. He shall have the right to have summons and subpoenas issued in his behalf by any person so authorized in this article. He shall be entitled at his own cost, to a copy of the record of the hearing.

§ 17. Committee action.

Upon failure of the accused attorney to appear at the time and place designated in the notice, or upon the termination of the formal hearing in accordance with the provisions of section fourteen of this article, the committee shall take the following action:

(a) If the committee determines that the case does not merit the taking of disciplinary action, the case shall be dismissed; or

(b) If the committee determines the case merits a private reprimand, it shall administer the same; or

(c) If the committee determines that the case merits a public reprimand or the suspension or annulment of the license of the accused, the committee shall organize and compose the case record with a written statement of the committee's finding and recommendations as to the disciplinary procedure considered warranted in, and an itemized statement of the actual and necessary expenses incurred in connection with, the case. Such record and papers shall constitute the complete file in the case as provided in section ten of this article and shall be designated "committee report."

In all cases the committee shall promptly report its findings and recommendations to the accused, all counsel of record in the case, the president and secretary of the state bar.

(*Amendments approved on September 24, 1962 and December 7, 1971.*)

PART D. PROCEDURES ON COMMITTEE REPORT

§ 18. Action by committee.

If the committee report finds and recommends that the case merits a public reprimand or that the license of the accused be suspended or annulled, the committee shall institute proceedings in the supreme court of appeals of West Virginia for administration of a public reprimand or for suspension or annulment of the license of the accused to practice law in this State.

(*Amendments approved on September 24, 1962 and December 7, 1971.*)

§ 19. Complaint and record.

In any such case wherein the committee determines to institute proceedings in the supreme court of appeals,

the committee shall cause a verified complaint to be prepared, addressed to said court, concisely setting forth the facts of the case, the reasons and grounds assigned for a public reprimand or the suspension or annulment of the accused's license, and the committee's prayer as to action and relief sought thereon. Such complaint, together with a certified copy of the committee report as provided in section seventeen of this article, shall be transmitted to and filed in the supreme court of appeals by delivery to the clerk thereof.

(*Amendments approved on September 24, 1962 and December 7, 1971.*)

§ 20. Court procedure.

Upon the filing of such complaint, the court shall issue an order addressed to the accused to show cause why the prayer of the committee in the complaint should not be granted and a disciplinary order entered. Such order shall be served and executed on the accused attorney in accordance with the provisions of section thirty-five of this article. Upon failure of the accused to appear and file written objections to the complaint, setting forth the grounds thereof, within the time specified in the order to show cause, the court shall proceed to consider the case upon the record and papers so filed. If the accused appears and files written objections to the complaint, as aforesaid, the case shall be forthwith considered upon the record then before the court, unless good cause be shown for further hearing, in which event a day certain, not more than thirty (30) days from the return day of the order to show cause, shall be set for such hearing. The hearing shall be held in such manner as the court may direct. Upon written request of the

accused, he shall be furnished, at his cost, copies of any part or parts of the record not then in his possession. Upon final submission of the case, the court shall consider the same and shall, by order entered of record, dismiss the complaint, administer a public reprimand to the attorney, suspend the attorney's license to practice law in this State for such period of time and upon such terms and conditions as may be adjudged by the court, annul the attorney's license to practice law in this State, or take such other action as the court in its judgment may consider proper, which order may include such provisions for reimbursement of the actual and necessary expenses incurred by the committee in connection with said case as the court shall deem just.

(Amendment approved on September 24, 1962.)

§ 21. Counsel representation and briefs.

The accused shall have the right to be represented by counsel in any such proceedings and hearings. Any member or members of the committee or counsel (not a member of said committee) appointed by the president or board on the request of said committee, shall prepare and prosecute the complaint addressed to the court and otherwise act in the case for and on behalf of the committee as may be proper. It shall be the duty of any attorney so designated by the president or board to prosecute such complaint and proceedings diligently and to the best of his ability. When directed by the court, counsel for the accused and for the committee may be required to file briefs or memoranda on any points or questions indicated by the court.

(Amendment approved on September 24, 1962.)

Part E. Other Proceedings

§22. Definition.

In this part E unless the context or subject matter otherwise requires, "court" means the supreme court of appeals of West Virginia or any court of record of this State, except a county court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1590

GROVER JONES, JR., *Appellant*,

v.

THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of West Virginia on the grounds that the appeal has not been taken in time, the appeal is not within the jurisdiction of this Court because not taken in conformity to statute, and the question presented is so unsubstantial as not to need further argument.

I. THE PROCEEDINGS BELOW

These proceedings were instituted by The Committee on Legal Ethics of The West Virginia State Bar pursuant

to the provisions of Article VI of the By-Laws of The West Virginia State Bar for the disbarment of the appellant. The appellant was charged with the unauthorized misappropriation and conversion of $22,700.00 entrusted to him in his fiduciary capacity as executor and trustee under the will of W. B. Hamby. The complaint charged the appellant with six violations of the Code of Professional Responsibility as adopted by the Supreme Court of Appeals of West Virginia.

After hearing on November 22, 1977, the Supreme Court of Appeals annulled and revoked the license of the appellant to practice law in the State of West Virginia for the reasons set forth in its opinion per curiam of the same date. The appellant applied for a rehearing. On February 6, 1978, the Court granted a hearing limited to reconsideration of the penalty imposed and the amount of costs awarded against the appellant. After rehearing and reargument, by its order entered on January 18, 1979, the Court found that the appellant's misconduct was such as to warrant the annulment of appellant's license to practice law and that the opinion per curiam announced on November 22, 1977, was justified and correct. The Court modified its former order only to the extent that the former order required the appellant to reimburse The Committee on Legal Ethics for legal fees incurred by it in the disbarment proceedings.

The rehearing and reargument before the Court were limited to a consideration of the severity of the penalty imposed, namely, disbarment, and the costs awarded against the appellant. The merits of the case and the other issues raised and determined by the Court's opinion per curiam were not reargued and were not reconsidered by the Court.

II. JURISDICTION OF THE COURT TO HEAR THIS CASE ON APPEAL UNDER 28 U.S.C. 1257(2)

Appellant in his jurisdictional statement has not attacked the validity of any statute of the State of West Virginia. The appellant does not assert that West Virginia Code §51-1-4a, the integrated bar statute, or Sections 1 through 22, inclusive, Article VI of the By-Laws of The West Virginia State Bar, are repugnant to the Fourteenth Amendment of the Constitution of the United States. Rather, the appellant asserts he was denied due process under the Fourteenth Amendment because.

> . . . the subcommittee had prejudged the cause; had determined that appellant was guilty before the hearing was closed; were contemptuous in their references to positions taken by both appellant and his attorneys; and were merely going through the formality of holding a hearing without being prepared to base a fair and reasoned decision upon the evidence adduced at the hearing. [Jurisdictional Statement, p. 14]

The appellant's position is stated at page 18 of the jurisdictional statement where it is charged:

> . . . The decision of the Supreme Court of Appeals ignores the evidence herein and authorizes the appellee to conduct its disbarment proceedings in utter disregard of the Constitution of the United States.

The appellant's assignment of error in this Court does not go to the validity of the statute or of any by-law of The West Virginia State Bar. On the contrary, the charge is of an unconstitutional exercise of authority by The Committee on Legal Ethics. Even where the federal question has been properly raised in the state court, an

appeal under 28 U.S.C. §1257(2) may be dismissed where the appellant fails to attack a statute explicitly in his jurisdictional statement. *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182, 185, 89 L.Ed. 857, 65 S.Ct. 624(1944); *Cady* v. *Georgia*, 323 U.S. 676, 89 L.Ed. 549, 65 S.Ct. 190 (1944); *Seaboard Airline R. Co.* v. *Watson*, 287 U.S. 86, 77 L.Ed. 180, 184, 53 S.Ct. 32 (1932); *Flournoy* v. *Wiener*, 321 U.S. 253, 88 L.Ed. 708, 64 S.Ct. 548 (1944). In *Flournoy* v. *Wiener*, this Court stated:

> It is a familiar rule, consistently followed, that upon appeal from a state court this court will not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon even through properly presented to and passed upon by the state court. 321 U.S. at 259.

and in *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182, 89 L.Ed. 857, 65 S.Ct. (1944), Mr. Chief Justice Stone, writing for the majority, stated:

> Even where the federal question has been properly raised below, an appeal under §237(a) may be dismissed where appellants fail to attack a statute explicitly in their assignments of error here. 324 U.S. at 187.

The appellant has failed to attack explicitly the validity of any statute by reason of its repugnancy to the Constitution of the United States.

Certiorari is the proper method of reviewing the alleged unconstitutional exercise of authority by The Committee on Legal Ethics. *Zucht* v. *King*, 260 U.S. 174, 67 L.Ed. 194, 43 S.Ct. 24 (1922); *Mergenthaler Linotype Co.* v. *Davis*, 251 U.S. 256, 64 L.Ed. 255, 40 S.Ct. 133 (1919).

Withrow v. *Larkin*, 421 U.S. 45, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975), cited by the appellant as sustaining the jurisdiction of this Court to review the judgment of the Supreme Court of Appeals of West Virginia on direct appeal under 28 U.S.C. §1257(2) did not involve an appeal from the judgment of a state court. On the contrary, *Withrow* v. *Larkin* was an appeal from a three judge district court.

III. THE APPEAL WAS NOT TIMELY

By its order entered on the 22nd day of November, 1977, the Supreme Court of Appeals of West Virginia annulled and revoked the license and authority of the appellant to practice law in the State of West Virginia for the reasons set forth in its opinion per curiam of the same date. On February 6, 1978, the Court granted a rehearing limited to a reconsideration of the penalty imposed and the amount of costs awarded against the appellant. By order entered on January 18, 1979, the Court found that the appellant's misconduct was such as to warrant the annulment of appellant's license to practice law in the State of West Virginia and that the opinion per curiam announced on November 22, 1977, was justified and correct. The Court modified its former order only to the extent that the former order required the appellant to reimburse The Committee on Legal Ethics for legal fees incurred by it in the disbarment proceedings.

The decision of the Supreme Court of Appeals of West Virginia with respect to any federal question became final no later than February 6, 1978, when the Court granted the appellant a rehearing limited to a reconsideration of the penalty imposed, disbarment, and the

amount of costs awarded against the appellant. The granting of a rehearing thus limited was in effect a denial of a rehearing as to all other issues in the case including any federal question raised therein.

Rule 13(1) of this Court provides that an appeal shall be docketed within ninety (90) days after the entry of the judgment appealed from. This appeal was docketed on April 18, 1979. The order of the Supreme Court of Appeals granting a limited rehearing and in effect denying a rehearing on the merits was entered on February 6, 1978.

The appellee submits that the appeal was not timely docketed as required by Rule 13(1).

IV. THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

The multiple functions accorded to and exercised by The Committee on Legal Ethics by virtue of Article VI of the By-Laws of The West Virginia State Bar, as approved by the Supreme Court of Appeals of West Virginia, do not violate the fundaments of due process required by the Constitution of the United States. While the right to practice law is indeed a valuable special privilege, and while any proceeding to deprive a lawyer of that privilege is subject to procedural due process, *In Re Ruffalo,* 390 U.S. 544, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968), the requisites of procedural due process in this context must necessarily be delineated by the fact that disciplinary proceedings against lawyers are ". . . neither civil actions nor criminal prosecutions but . . . are special proceedings which are peculiar in their nature." *Committee on Legal Ethics of The West Virginia State Bar* v. *Graziani,* 200 S.E.2d 353 (W.Va. 1973), cert. den'd., 416 U.S. 995, 94 S.Ct. 2410, 40 L.Ed.2d 474 (1974); *Committee on Legal Ethics of The West Virginia State Bar* v. *Pence,* 240 S.E.2d 668 (W.Va. 1977).

The appellant contends that the procedures utilized by the Committee in initiating, investigating, and prosecuting complaints violate the due process clause of the Fourteenth Amendment. As pointed out by the Supreme Court of Appeals of West Virginia in its opinion of November 22, 1977, The Committee on Legal Ethics has no adjudicatory function in disbarment proceedings. This function is exercised solely by the Supreme Court of Appeals. In its opinion (see Jurisdictional Statement, p. A-6) the Supreme Court of Appeals said of the Committee's functions:

> Counsel for the subcommittee is in charge of investigation and preparing the case against the respondent; the subcommittee acts as fact finder; the role of adjudicator reposes with this Court.

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk in administrative adjudications has been considered and rejected by this Court on several occasions. *Withrow* v. *Larkin,* 421 U.S. 45, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975); *FTC* v. *Cement Institute,* 333 U.S. 683, 92 L.Ed. 1010, 68 S.Ct. 793 (1948); *NLRB* v. *Donnally Garment Co., Co.,* 330 U.S. 219, 91 L.Ed. 854, 67 S.Ct. 756 (1947); *Richardson* v. *Perales,* 402 U.S. 389, 28 L.Ed.2d 842, 91 S.Ct. 1420 (1971).

In *Withrow* v. *Larkin,* 421 U.S. 45, Mr. Justice White, writing for a unanimous court, said:

> The contention that the combination of investigative and adjudicative functions necessarily cre-

> ates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies in human weakness, conferring investigative and adjudicative powers on the same individual poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guaranty of due process is to be adequately implemented . . .
>
> It is not surprising, therefore, to find that "[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process . . ." Similarly, our cases, although they reflect the substance of the problem, offer no support for the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle. 421 U.S. at 47-48 and 52.

This Court thus found no prejudice inherent in the procedural structure in *Larkin*, and noted, in addition, that "there was no more evidence of bias or risk of bias or prejudgment than inhered in the very fact that the Board had investigated and would now adjudicate." 421 U.S. at 54.

Here there is no combination of investigative and adjudicative functions. The role of adjudicator reposes in the Supreme Court of Appeals. The role of the Committee is that of fact finder. If the Committee determines that disciplinary proceedings should be instituted, it must file a complaint with the Court together with the record of

the hearing and the Committee's report. (By-Laws of The West Virginia State Bar, ¶¶17, 18, and 19). Upon the filing of such a complaint the Court must issue an order addressed to the accused attorney to show cause why a disciplinary order should not be entered. The accused attorney may appear and file written objections to the complaint and the case is considered on the record then before the Court (By-Laws, Rule 20), unless good cause be shown for a further hearing. The hearing shall be held in such manner as the Supreme Court of Appeals may direct. (By-Laws, Rule 20).

If there was no unconstitutional prejudice inherent in the procedural structure considered in *Withrow* v. *Larkin*, where the investigative, prosecutorial and adjudicatory functions were exercised by a single agency, certainly there is no constitutional infirmity in the West Virginia procedure, where the Committee exercised no adjudicatory function and its role was limited to that of investigation and fact finding. The role of the Committee is similar to that of a master or a commissioner appointed by the Court to investigate and report facts and make recommendations. The Court retains the role of adjudicator.

The appellant contends that the Committee exhibited bias, hostility and prejudice against him. The Supreme Court of Appeals disposed of this contention saying:

> Likewise, we find no merit in the contention that the disciplinary procedure of The West Virginia State Bar denies due process by violating respondent's right to appear before an impartial, unbiased hearing tribunal. U.S. Const. Amend. XIV, §1; W.Va. Const., art. 3, §10; *North* v. *West Virginia Board of Regents*, ...W.Va....., 233 S.E.2d 411 (1977).

> Defendant does not allege that the designated subcommittee of the State Bar Ethics Committee prejudiced him by a display of actual bias or hostility. Nor does the record evidence any. Rather, he theorizes that the investigative, prosecutorial and fact finding functions of the subcommittee overlaps so as to inherently prejudice the subcommittee against any attorney brought before it.

This Court has held that it will not exert its jurisdiction merely to review a decision of a state court upon a question of fact. Once a case is otherwise before it this Court generally will not reexamine a state court's findings and conclusions of fact. *Grayson* v. *Harris,* 267 U.S. 352, 358, 69 L.Ed. 652, 45 S.Ct. 317 (1924); *Portland R. Co.* v. *Railroad Commission,* 229 U.S. 397, 412, 57 L.Ed. 1248, 33 S.Ct. 820 (1912); *Fry Roofing Co.* v. *Wood,* 344 U.S. 157, 160, 97 L.Ed. 168, 73 S.Ct. 204 (1952).

As authority for the unconstitutionality of the procedures utilized by the Committee in initiating, investigating, and presenting the complaint against him, appellant cites only *In Re Schlesinger,* 404 Pa. 584, 172 A.2d 838 (1961). Although it might be contended that the holding in *Schlesinger* more likely rests on the Pennsylvania Courts philosophical discomfort with the basis for the particular disbarment proceeding, a charge of communism, rather than on the express concern for due process, the fact remains that the due process analysis applied in *Schlesinger* has since been superseded by that enunciated by this Court in *Withrow* v. *Larkin,* 421 U.S. 35 (1975). The latter case makes clear that the statutory scheme as written and applied by The Committee on Legal Ethics in proceedings to discipline lawyers is constitutional, and does not unfairly abridge any right of the appellant to procedural due process.

V. CONCLUSION

Wherefore, appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument and the appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David A. Faber, one of the attorneys for the appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify, that on the 11th day of May, 1979, I served three copies of the foregoing Motion to Dismiss or to Affirm on the appellant by depositing the same in the United States mail box, with postage prepaid, addressed to counsel of record for the appellant, Stanley A. Preiser, 1012 Kanawha Boulevard, East, Post Office Box 2506, Charleston, West Virginia 25329, and Leo Catsonis, 205 Security Building, Charleston, West Virginia 25301. I further certify that all parties required to be served have been served. David A. Faber

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